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# ZIMBABWE LAW REVIEW

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# THE ZIMBABWE LAW REVIEW

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# FREEDOMS OF ASSOCIATION AND OF ASSEMBLY: SOME INTERNATIONAL AND COMPARATIVE PERSPECTIVES

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## INTRODUCTION

The freedoms of assembly and of association, while closely linked and generally serving similar ends in a democracy, are nevertheless different and distinct. However, they are so sufficiently connected<sup>1</sup> that it is instructive for general comments about them to be made together. At the centre of the two freedoms is the recognition of the idea that there are certain legitimate goals which the individual can only best attain by working with others and accordingly that these freedoms must be protected for the attainment of those goals. It is this central idea which shapes the nature and scope of these freedoms.

The freedom of assembly covers the holding of meetings and the mounting of demonstrations through picketing, protest marches and processions.<sup>2</sup> The "freedom" arises from the fact that "no permission is needed from any public authority before a group of individuals meets to discuss a matter of common concern."<sup>3</sup> What makes it an assembly is that more than one person is necessary to constitute it. There is no clear position on whether or not the number of persons should be more than two or even more than three.<sup>4</sup> However, not every group of people constitutes an assembly. Persons present must be conscious of being together in furtherance of a common goal.<sup>5</sup>

The freedom of association consists of the individual's freedom to "establish, to join or take part in the activities of the association."<sup>6</sup> It is the freedom of "individuals to come together for the protection of their interests by forming a collective entity which represents them".<sup>7</sup> This freedom necessarily requires that the association arising from the exercise of the freedom be free to run its affairs without undue interference from public authorities.

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1. In the United States, the First Amendment is in the following words: "Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The "freedom of association" is not directly mentioned, but the courts have held it is implicitly covered, it being derived from the freedoms of speech and assembly: see for instance: *United Mine Workers v Illinois State Bar Association* 389 US 217 (1967); *NAACP v Alabama ex rel. Patterson* 357 US 449 (1958).
  2. See generally D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) p. 418.
  3. See A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (12th edition, Longman, 1997) p. 610.
  4. See the discussion on the position in Germany by Stuart Woolman & Johan de Waal, below, note 9 p. 37.
  5. *Ibid.*
  6. See Johan de Wall *et. al* *The Bill of Rights Handbook* (4th Edition, Juta & Co. Ltd, 2001) p. 342.
  7. See D.J. Harris *et. al*, *supra*, p. 421.

## JUSTIFICATIONS FOR THE FREEDOMS OF ASSEMBLY AND OF ASSOCIATION

Why are these freedoms regarded as fundamental and thus deserving of protection as civil and political rights? This question goes to the root of the essence of Bills of Rights in modern constitutions. American jurisprudence is replete with heated debates among constitutional theorists as to whether or not these freedoms are merely means to an end or are also ends in themselves.<sup>8</sup> The better view is to adopt what may be described as the “dual perspective” whereby these freedoms are both a means to an end and also an end in themselves. This approach produces two main reasons why these freedoms are regarded as fundamental. First, the freedoms are essential to the proper functioning of a responsive and responsible democracy. Freedom of assembly enables individuals to come together and express a collective opinion. It has thus been asserted:

In the US, freedom of assembly is understood to be foundational for the life of a liberal democracy for two primary reasons. First, it helps create space for collective politics. This space for collective politics is crucial. While a single voice is likely to be drowned out in the political community, a collective voice is far more likely to get its message across. Secondly, assembly is essential for democratic politics because only through meeting and talking with fellow citizens can we critically explore the various beliefs and values which animate our political decisions. It is generally believed that the more we discuss the ideas we seek to put into practice, the better and the more legitimate our political decisions are likely to be.<sup>9</sup>

The freedom of assembly, especially through demonstrations, enables groups whose views may not be taken up by political representatives to advance these viewpoints directly to the government. In this way, an assembly acts as a direct form of democracy, thus remedying some of the defects of representative politics. In the words of Woolman:

... marginal viewpoints, beliefs and practices may not command the attention they deserve because their proponents lack adequate political representation in Parliament. Freedom of assembly thereby provides a corrective to simple majoritarianism.<sup>10</sup>

The freedom of association achieves similar political ends. The freedom makes it possible to achieve political participation by the people, thereby achieving a genuine representative democracy. Through political associations such as political parties, people's views are collected and articulated and responses to government proposals are made. Influential associations such as trade unions tend to counterbalance the dominance of political parties in political discourse.

The result is a more responsive and participatory democracy given that diverse centres of power, each with a capacity of exerting influence on the exercise of public power, are created.<sup>11</sup>

8. For a detailed analysis and discussion, see generally L. Tribe, *American Constitutional Law* 2nd Edition (Foundation Press, 1988) Chapter 12.

9. Stuart Woolman & Johan de Waal, “Freedom of Assembly; Voting with Your Feet”, in Van Wyk *et. al*, *Rights and Constitutionalism* p. 292 and 299.

10. See Stuart Woolman, “Freedom of Assembly”, in Matthew Chaskalson, *et. al* *Constitutional Law of South Africa* (Juta & Co Ltd, 1996) Chapter 21 at 21-1.

11. See generally Johan de Waal *et. al* *The Bill of Rights Handbook* (supra) p. 341; D.J. Harris *et. al* *Law of the European Convention* (supra) p. 418.

It must be clear that this first purpose of the freedoms is instrumentalist: it sees the freedoms as instrumental or functional to democracy. In other words, they are merely a means to ensuring that society achieves an open and effective democracy.

This brings us to the second purpose, which recognises that these freedoms are not just functional to democracy but are also ends in themselves. It is said that like every other natural right, such as natural liberty, these freedoms enhance the personal growth, self-realisation and self-fulfilment of individuals. As part of his/her self-realisation, the individual needs these freedoms to maintain those attachments which he/she believes to be fundamental be they intimate, religious, social or cultural. The approach of regarding these freedoms as natural and as ends in themselves was underscored by the American liberal scholar, de Toqueville in the following words:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.<sup>12</sup>

As already noted, these freedoms must be viewed as both a means to attaining a properly functioning democracy and as ends in themselves in being part and parcel of the individual's self-realisation. Such an approach is crucial to a proper understanding of the nature and scope of these freedoms.

## **FREEDOM OF ASSEMBLY**

The freedom of assembly is universally recognised. The following provisions exist in selected international instruments and national constitutions of four states in Sub-Saharan Africa.

### **UN Declaration of Human Rights, 1948**

#### Article 20

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

### **International Covenant on Civil and Political Rights, 1966**

#### Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights or freedoms of others.

### **European Convention on Human Rights, 1950**

#### Article 11

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

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12. See Alexis de Toqueville, *Democracy in America* (1835) p. 196 edited by Bradley 1945.

- (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

### **African Charter on Human and People's Rights, 1981**

#### **Article 11**

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for the law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

### **Constitution of South Africa (1996)**

Section 17: Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

### **Constitution of Zimbabwe (1980)**

Section 21 (1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests. (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

### **Constitution of Namibia (1990)**

Article 21(2) All persons shall have the right to ... (d) assemble peaceably and without arms.

### **Constitution of Uganda (1995)**

Section 21(1) All persons shall have the right to ... (d) freedom of assembly including freedom to take part in processions and demonstrations.

## **SCOPE OF THE FREEDOM OF ASSEMBLY**

Two critical points may be made about the scope of the freedom of assembly. First, while not stated in the international instruments, the freedom of assembly is closely connected with the freedom of expression in that, in general, an assembly is aimed at expressing a common opinion. In American and Canadian human rights jurisprudence, this aspect has shaped the scope of the freedom of assembly which is treated as an adjunct of freedom of expression.<sup>13</sup> The assembly is characterised as "expressive conduct", which is distinct from

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13. For a general discussion of this, see Woolman & de Waal (supra).

direct speech. This approach may be misleading in one respect; while an assembly is, in general, aimed at expressing a common opinion, the fact of assembling is, in itself, a fundamental right which has a value independent of the opinions which may be expressed during or are implicit in the assembly.

Second, it is trite that what is protected is a "peaceful" assembly. This qualifies the freedom. In determining whether an assembly is peaceful or not, the intentions of the organisers and assemblers are paramount. Where the intention is to cause disturbances, the assembly cannot be said to be peaceful but random or incidental acts of violence are not sufficient to render an assembly not peaceful.<sup>14</sup> Sit-ins and blockades, which are common mechanisms of exercising the freedom of assembly, are considered as peaceful as long as the intention is to communicate a viewpoint. They are not peaceful if their whole point is merely to obstruct with a view to forcing compliance with given demands.<sup>15</sup> If demonstrators damage property and intimidate those not participating in the demonstration, the assembly cannot be regarded as peaceful.<sup>16</sup>

Further, the protection of a "peaceful" assembly necessarily imposes a duty on the state to take positive measures to enable lawful assemblies to proceed without interference by counter-demonstrators. In the European case of *Platform Ärzte v Austria*<sup>17</sup> counter-demonstrators disrupted the applicant's peaceful assembly by using loudspeakers and throwing eggs. The European Court of Human Rights held that the state has a positive duty to protect peaceful demonstrators from counter-demonstrators. It found, however, that in that particular case, the state had discharged its duty as the police had been present in large numbers and had successfully interposed themselves between the opposing groups.

## RESTRICTIONS ON FREEDOM OF ASSEMBLY

The freedom of assembly is not absolute. Virtually every international instrument allows restrictions to be imposed on the exercise of this freedom. The standard approach in this regard is that a restriction must be "prescribed by law" and "be necessary in a democratic society" in furtherance of some defined governmental interest such as public order or national security.<sup>18</sup> While the requirement that a restriction be "prescribed by law" or be "imposed in conformity with the law" does not normally raise problems, it is nonetheless an important one. It requires the existence of some specific legal rule authorising the state to interfere with the fundamental freedom.<sup>19</sup> The European Court of Human Rights has held that the source of the legal rule in question may be statute law, common law, delegated legislation or royal decrees.<sup>20</sup> This wide definition of law has been followed in Southern

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14. See generally *Christians Against Fascism v United Kingdom* 8440/78, 21DR 138 (1980).

15. See Johan de Waal, Iain Curie and Gerhard Erasmus, *The Bill of Rights Handbook* 2001 (4th edition), p. 335.

16. See the South African case of *Acting Superintendent-General of Education of KwaZulu-Natal v Nguno* 1996(3) BCLR 369 (N).

17. 10126/82, 44 DR65 (1985).

18. See in particular, the formulation in the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*.

19. See *Silver v UK* 1983 Series A, No. 67; 5EHRR 347.

20. See *Klass v Federal Republic of Germany* (1979) 2 EHRR 214.

Africa.<sup>21</sup> Further, to have the quality of "law" within the contemplation of international conventions, the rule must be adequately accessible to persons affected and be sufficiently precise in its formulation.<sup>22</sup> In *Sunday Times v UK*,<sup>23</sup> the European Court of Human Rights expressed these latter aspects as follows:

Firstly, the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.

Where an infringement of the freedom is not based on any law, it is unlawful and cannot be regarded as a justified limitation because it is not "prescribed by law." Similarly, where the infringement is based upon a rule which is vague (not sufficiently precise) or not adequately accessible, it is unlawful and cannot be considered as a justified limitation for the same reason that it is not "prescribed by law." In other words, a purported law which is vague is not "law" for purposes of the expression, "prescribed by law". In *Kruslin v France*,<sup>24</sup> the French government relied on some provisions of its Code of Criminal Procedure to justify secret telephone tapping by the police. The provisions in question neither identified the persons whose telephones might be tapped nor imposed any limits of time during which the tapping could be carried out. The court held that this was not sufficiently precise given that "tapping and other forms of interception of telephone conversations represent a serious interference with private life and must accordingly be based on a "law" that is particularly precise."<sup>25</sup> Accordingly, the court concluded that the law in question was not "law" for purposes of the requirement of "prescribed by law" and the interference was thus illegal. In *Silver v UK*<sup>26</sup> unpublished Prison Orders and Instructions which were not part of the relevant subsidiary legislation were held not to be "law" and so the requirement of "prescribed by law" was not satisfied.

A law which confers discretion on a public official without indicating with sufficient precision the limits of that discretion does not satisfy the quality of "law" contemplated by the requirements of "prescribed by law".<sup>27</sup> The essence of law is to enable individuals to conform their behaviour to an identifiable legal standard. A rule which is not sufficiently precise cannot attain this characteristic and must not be regarded as "law" for purposes of the requirement of "prescribed by law".

In the South African case of *August v Electoral Commission*,<sup>28</sup> the Commission took no steps to enable prisoners to register and/or vote. This came about because of budgetary and administrative considerations but there was no law at all to authorise the commission to

21. See the South African cases of *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 44; 136, *Lorvi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC).

22. See *Sunday Times v UK* (1979) 2 EHRR 245.

23. *supra*.

24. A176-A(1990).

25. See para 33 of the judgement.

26. A61 paras 87-88 (1983).

27. See *Silver v UK* A 61 para 80 (1983).

28. 1999(3) SA1 (CC).



interfere with the right of prisoners to vote. The conduct of the Commission was held unlawful on the simple ground that it was not “prescribed by law”. The issue of justifying the infringement of the fundamental right in question did not arise because the conduct fell on the first ground of not being “prescribed by law.”

In the light of this discussion on the requirement of “prescribed by law” and given the centrality of the freedom of assembly, it is submitted that a restriction based on draconian legislation which is either not sufficiently precise or grants unlimited discretionary powers to the police is unlawful. Such imprecise or discretionary restrictions lack the quality of “law” envisaged in the requirement of being “prescribed by law” and fall away on that basis.

The second important requirement in any restriction on a fundamental right is that it be “necessary in a democratic society.” This is the phrase favoured by most international instruments.<sup>29</sup> In domestic legislation, mainly in constitutions of states, other formulations exist, such as “reasonable and justifiable in an open and democratic society”<sup>30</sup> and “reasonably justifiable in a democratic society.”<sup>31</sup> Whatever the formulation adopted, this requirement of a restriction involves two separate questions. First, what are the objectives/purposes of the restriction and are they permissible/reasonable? Secondly, is the restriction, in the light of its objectives/purposes, necessary/justifiable in a democratic society?

Regarding the first question, it is important that the objectives or purposes of the infringing law be identified and adjudged as reasonable or permissible. On the other hand, where a purpose is adjudged unreasonable, any restriction made to serve the purpose is *per se* unlawful. For example, the protection of the private morality of a sector of society has been held to be unreasonable in South Africa thereby rendering unlawful any restriction designed to serve the purpose.<sup>32</sup>

Most international human rights instruments and constitutions of states prescribe the purposes for which a restriction may be made. Thus, in the International Covenant on Civil and Political Rights, a restriction is only permissible if it is “in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights or freedoms of others”.<sup>33</sup> Where an international instrument or national constitution specifies the purposes for which a restriction may be permissible, reliance on any other purpose or objective not specified renders the infringement unlawful. In other words, in such a situation, a restriction can only be valid for the specified purposes. This does not mean that a state can easily escape this requirement by merely stating a permissible reason while the “real” reason is an impermissible one. A

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29. See International Covenant on Civil and Political Rights, 1966 (Article 21); European Convention on Human Rights, 1950 (Article 11) and African Charter on Human and People’s Rights, 1981 (Article 11).

30. See Section 36(1) of the South African Constitution, 1996.

31. See sections 19, 20 and 21 of the Constitution of Zimbabwe 1980.

32. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6 (CC).

33. See Article 21, See also Article 11 of the European Convention on Human Rights and Article 11 of the African Charter on Human and People’s Rights.

litigant is entitled to base his/her challenge on the "real" reason provided he/she is able to prove that the reason relied on by the state is a mere cover of what is being done for a different purpose.<sup>34</sup>

Where the international instrument or national constitution does not specify any purposes/objectives for which a restriction may be imposed, the state must rely on "reasonable" objectives/purposes. It is submitted that a reasonable objective is one which reasonable persons would regard as *prima facie* acceptable in a democratic society. It has also been said that a reasonable objective is one which is of "sufficient importance" to warrant restricting a fundamental right.<sup>35</sup> Examples of acceptable and therefore "reasonable" purposes are those found in international or national instruments which have specified the purposes for which a restriction is permissible and these include "national security", "public order", "protection of public health or morals" and "protection of the rights of others". The list of reasonable objectives cannot be limited and the jurisprudence emerging from national courts provides illuminating examples of such objectives.

In South Africa, the following have been held to be reasonable purposes for restricting a fundamental right: the prevention, detection, investigation and prosecution of crime,<sup>36</sup> reduction of unemployment among citizens,<sup>37</sup> protection of children against violence and indignity<sup>38</sup> and protection of the interests of the administration of justice.<sup>39</sup>

The second question arises once the purpose/objective of the restriction has been identified and adjudged as permissible or reasonable, as the case may be. This question as already noted is: Is the restriction, in the light of its objectives/purposes necessary/justifiable in a democratic society? This is a separate enquiry from the assessment of whether or not the purpose/objective put forward for a restriction is reasonable. In assessing the reasonableness of a purpose, only the abstract nature of it is considered and no regard is had to the restriction. In other words, is it intrinsically reasonable regardless of the nature and extent of the restrictions? Once it is considered intrinsically reasonable, the second assessment arises, focusing on the nature and extent of the restriction: is the restriction necessary to achieve the purpose?

While most international instruments favour the word "necessary" most national constitutions prefer "justifiable". In *Handyside v UK*<sup>40</sup> the European Court of Human Rights said the following about the word "necessary":

... the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".

34. See generally *Campbell v UK* A233 para 39-41 (1993).

35. See the Canadian case of *R v Oakes* (1986) 1 SCR 103.

36. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079 (CC) para 53.

37. *S v Mbatha* 1996 (2) SA 464 (CC).

38. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

39. *Shabalala v Attorney-General (Transvaal)* 1996 (1) SA 725 /9CC) para 52.

40. A24 para 48.

It is submitted that nothing turns on the use of a particular word. Whether it is the word "necessary" or "justifiable" or even any of the other words purportedly distinguished by the European Court in the above passage, the enquiry is the same. It is a requirement of proportionality and was ably stated by the same court in *Olsson v Sweden*<sup>41</sup> as follows:

... the notion of necessity implies that an interference corresponds to a pressing social need and in particular, that it is proportionate to the legitimate aim pursued.

Thus a restriction is necessary or justifiable in a democratic society if the infringement it inflicts on a fundamental right strikes an appropriate proportionality with the purposes it seeks to serve. If the infringement is disproportionate to the purposes designed to be achieved, the restriction cannot be justifiable in a democratic society. The test for proportionality is a value judgement arrived at after weighing a variety of factors such as the nature of the society, the purpose of the restriction and whether or not there may be less restrictive means of achieving the same purpose.<sup>42</sup> It is worth noting that, "questions of proportionality involve some element of balancing one factor against another but it is not a scientific process, despite the metaphor."<sup>43</sup>

The Canadian case of *R v Oakes*<sup>44</sup> appears to be the *locus classicus* on the approach to assessing proportionality. It proposes three components of the test. The relevant passage in the judgement reads as follows:

Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".<sup>45</sup>

In the South African case of *S v Makwanyane*<sup>46</sup> it was emphasised that in an assessment based on proportionality, no "'absolute standard' can be laid down although "principles can be established, but [their] application to particular circumstances can only be done on a case-by-case basis".<sup>47</sup>

Zimbabwean courts have endorsed the approach in *R v Oakes* although the language preferred tends to emphasise the element of arbitrariness as the main basis of the test.<sup>48</sup> The formulation favoured is as follows:

41. A130 para 67 (1988).

42. See Section 36 of the 1996 South African Constitution, which stipulates some of the factors.

43. See D.J. Harris, M.O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) p. 301.

44. (1986) 1 SCR 103, (1986) 26 DLR (4th) 200.

45. At p. 228 of DLR report.

46. *supra*.

47. See para 104.

48. See *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S) at 13.

What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or *excessively* invades the enjoyment of the guaranteed right according to the standards of a society that has proper respect for the rights and freedoms of the individual.<sup>49</sup>

Clearly, the issue of “excessiveness” or lack of it is a proportionality discourse.

It is submitted that an approach based on the guiding components of the proportionality test enunciated in *R v Oakes* provides a systematic assessment of proportionality and must be recommended for adoption by courts adjudicating on the lawfulness of restrictions on fundamental rights.

In line with the general approach to the limitation of fundamental rights, the freedom of assembly may only be limited pursuant to prescriptions imposed by law [“prescribed by law” requirement], for a reasonable/permissible purpose and in circumstances where it can be said that it is necessary/justifiable in a democratic society. The “prescribed by law” requirement rarely raises problems as states almost invariably rely on some legislation regulating public gatherings and processions.<sup>50</sup> The purposes of the restrictions vary but the more common ones are “prevention of disorder or crime”, “public safety” and “the protection of the rights and freedoms of others”. These purposes are generally regarded as reasonable and are in fact permitted by most international instruments and national constitutions. However, it is not uncommon in some states for public gatherings or processions to be prohibited for the purpose of suppressing the political opinions of persons involved. Such a purpose is neither permissible nor reasonable and the restriction is thereby unlawful.

It is the requirement of being necessary/justifiable in a democratic society which arises in matters of restrictions on the freedom of assembly. As already discussed, this requirement resolves itself into a proportionality assessment and each case depends on its own circumstances. Be that as it may, some trends are discernible. First, a requirement that public authorities, such as the police, be notified of an intended protest march or demonstration may be held to satisfy the proportionality test.<sup>51</sup> This arises from the fact that the notification requirement is a minor infringement of the freedom and cannot be said to be disproportionate to its purposes.<sup>52</sup> Secondly, the requirement to obtain prior authorisation or a permit for an assembly as distinct from mere notification, may satisfy the proportionality test if there is no arbitrariness in granting the permission or authorisation.<sup>53</sup> An example of a provision granting arbitrary powers to a public authority

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49. See *Woods & Ors v Minister of Justice* 1994 (2) SLR 195(S) at 199B-C. See also *In re Munhumeso* 1994 (1) ZLR 49 (S) at 64B; *Commission of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C.

50. See for instance The Regulation of Gatherings Act, 205 of 1993 (South Africa) and the Law and Order Maintenance Act (Chapter 11:08)(Zimbabwe).

51. See the European Court’s judgement in *Rassemblement Jurassien Unite Jurassienne v Switzerland* 17DR 93 (1979).

52. The purposes include “the prevention of disorder” and “the protection of the rights of others”.

53. See *Rassemblement Jurassien Unite Jurassienne v Switzerland* No 17DR 93 (1979).

to refuse to authorise a demonstration is section 6(2) of the Zimbabwean Law and Order (Maintenance) Act<sup>54</sup> which provides:

Any person who wishes to form a procession shall first make application in that behalf to the regulating authority of the area in which such procession is to be formed and if such authority is satisfied that such procession is unlikely to cause or lead to a breach of the peace or public disorder, he shall, . . . issue a permit in writing authorising such procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such procession as the regulating authority may deem necessary to impose for the preservation of public order.

This provision was held to be an infringement of the freedoms of assembly and of expression by the Zimbabwean Supreme Court in *In re Munhumeso*.<sup>55</sup> The provision failed the proportionality test on account of the arbitrary powers it placed in the hands of the police to interfere with a fundamental freedom. The court noted the following arbitrary features in the provision: (i) there is no criteria to be used by the regulating authority in the exercise of its discretion, (ii) the regulating authority is not obliged to take into account whether the likelihood of a breach of peace could be averted by attaching conditions such as time, duration and route, and (iii) it allows refusal of a permit even on the slightest possibility of breach of peace.<sup>56</sup>

This approach whereby a statute which gives arbitrary powers to a public authority to refuse permission to assembly fails to meet the proportionality test is firmly rooted in American jurisprudence. Thus in *Shuttlesworth v Birmingham*,<sup>57</sup> the court found that the city commission had power to refuse permission for a procession on such vague criteria as “public welfare, safety, health, decency and public morals” and concluded that this created an avenue for arbitrariness. It struck down the legislation. Similarly, in *Gregory v Florida*<sup>58</sup> a statute which gave the police almost unlimited discretion to decide whether or not demonstrators had committed a “diversion tending to a breach of the peace” was declared an unconstitutional interference with freedom of assembly.

Thirdly, an outright ban of peaceful demonstrations is unlikely to satisfy the proportionality test. A ban usually takes the form of an order by a public authority disallowing public demonstrations in a given area either for an indefinite duration or for a specified period. Given the significance of freedom of assembly in a democratic society, there can be no reason so compelling as to justify an outright denial of freedom without considering each case on its own merits. Accordingly, it is submitted that a general ban on peaceful demonstrations fails to strike a proportionate balance between the purpose/s sought to be served and the freedom of assembly. In *Christians Against Fascism v United Kingdom*<sup>59</sup> the European Commission of Human Rights took the view that a general ban on demonstrations could only be justified if there was a real danger of disorder which could not be avoided by

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54. Chapter 11:08.

55. 1994(1) ZLR 49(S).

56. See pages 64 E–65A of the judgment of Gubbay C.J.

57. 394 US 147 (1969).

58. 394 US 111 (1969).

59. 21DR 138 (1980).

less stringent measures. This formulation is too broad and gives a wide margin of manoeuvre to public authorities. It is difficult to conceive circumstances in which every demonstration may create a "real danger of disorder" so as to warrant a general ban. Each case must be considered on its own merits and the better view appears to be that a general ban is disproportionate to the purposes sought to be achieved and cannot be justified.

American jurisprudence has developed the so-called "public-forum" doctrine to deal with restrictions on the freedoms of assembly and of expression.<sup>60</sup> According to this doctrine, where public property is classified as a public forum, a blanket ban on freedom of assembly rights in the public place is, in general, forbidden. What may be permissible is for the state to impose restrictions which are less than an outright ban. Such "time, place and manner" restrictions, must, however, pass a highly demanding test requiring a restriction to be content-neutral, serve a legitimate government interest and is viewpoint-neutral.<sup>61</sup>

Thus, classifying a place as a "public forum" leads a court to tilt more in favour of freedom of assembly than the governmental interests at stake, while the reverse is true if the place is characterised as a non-public forum. However, in both cases, the court still requires a restriction to be reasonable as to time, place and manner.<sup>62</sup> Determining reasonableness entails a balancing act. It is submitted that the "public forum" doctrine is not helpful: the courts must simply employ the proportionality test, with the public forum/non-public forum distinction being relevant to the question of proportionality. Leading American scholars have criticized the rhetoric of "public-forum" analysis and have urged the courts to openly adopt an approach along the lines of the proportionality test. In the words of Tribe:

... whether or not a given place is deemed a 'public forum' is ordinarily less significant than the nature of the speech restriction — despite the courts rhetoric . . . the court uses 'public forum' talk to signal conclusions it has reached on other grounds, it might be considerably more helpful if the court were to focus more directly and explicitly on the degree to which the regulation at issue impinges on the first amendment interest in the free flow of information, translating this inquiry into public forum language may simply confuse the development of first amendment principles.<sup>63</sup>

Fourthly, may freedom of assembly be exercised on private property? In view of the constitutional protections of the right to private property and privacy, any law that bans freedom of assembly on private property, almost invariably satisfies the proportionality test. This is because private property interests largely compete, on an equal basis, with freedom of assembly. However, there is an exception in cases involving certain forms of private property which have a "public nature" such as shopping centres and private halls.

60. For an instructive analysis of the "public forum" doctrine, see L.H. Tribe, *American Constitutional Law* (2nd edition) Foundation Press, 1988 p. 986ff.

61. See *Greer v Spock* 424 US 828 (1976); *Widmar v Vincent* 454 US 263 (1981). To say that a ban or restriction must be "viewpoint-neutral" is to distinguish it from being "content-neutral". The latter means no distinction based on the contents or subject of the speech. The former accepts that a distinction may be made regarding the subject of speech, but once a particular subject is allowed, no distinction should be drawn between differing views on the subject.

62. See Tribe, *op. cit.* at p. 992-993.

63. *Ibid.* See also, Farber & Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication" (1984) 70 Va LR 1219.

In the American case of *Food Employees Local 590 v Logan Valley*,<sup>64</sup> the court held that, in view of the 'public nature' of a shopping centre, the exercise of freedom of expression (in the form of picketing) in the shopping centre was protected by the constitution. This was severely qualified by subsequent cases. In *Lloyd Corp v Tanner*,<sup>65</sup> the court held that a shopping centre was not available for assembly rights where the protesters could have easily conveyed their message in an alternative public place in front of the shopping centre. This was followed in *Hudgens v NCRB*<sup>66</sup> where striking employees were denied constitutional protection to picket in front of a store, presumably because they could easily have accomplished their mission at a nearby public place.

This latter approach suggests that a private shopping centre or a private hall may still be available for freedom of assembly provided it can be shown that there is no effective alternative place for the exercise of the freedom. In other words, the proportionality test may favour protection of the freedom of assembly in such cases.

Fifthly, it is common in some statutes to prescribe criminal penalties in the event of breach of the restrictions imposed on freedom of assembly. It is one thing for the court to uphold the restrictions and quite another for it to enforce the criminal penalties accompanying any breach of the restrictions. The penalty itself may be declared unconstitutional as an infringement of the freedom of assembly if it is deemed disproportionate.<sup>67</sup> In *Ezelin v France*<sup>68</sup> the applicant participated in a demonstration against the courts and judges. The demonstration degenerated into violence, and the applicant, who was a lawyer, refused to answer police questions and did not dissociate himself from the demonstration. He was reprimanded by the Court of Appeal in its exercise of disciplinary functions over lawyers. The European Court of Human Rights held such a penalty to be disproportionate to the interest of the prevention of disorder. Clearly, therefore, a court may accept certain restrictions as legitimate but still outlaw a disproportionate penalty accompanying breach of the restriction.

## FREEDOM OF ASSOCIATION

The freedom of association, like freedom of assembly, is universally recognised. The following provisions exist in selected international instruments and national constitutions of four states in Sub-Saharan Africa.

### UN Declaration of Human Rights, 1948

#### Article 20

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

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64. 391 US 308 (1968).

65. 407 US 551 (1972).

66. 424 US 507 (1976).

67. See *Ezelin v France* A202 para 47 (1991).

68. *Ibid.*

## **International Covenant on Civil and Political Rights, 1966**

### **Article 22**

- (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
- (3) Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in the Convention.

## **European Convention on Human Rights, 1950**

### **Article 11**

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

## **African Charter on Human and People's Rights**

### **Article 10**

- (1) Every individual shall have the right to free association provided that he abides by the law.
- (2) Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

## **Constitution of South Africa**

Section 18: Everyone has the right to freedom of association.

## **Constitution of Zimbabwe**

Section 21 (1) except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests. (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

## **Constitution of Namibia (1990)**

Article 21(1) All persons shall have the right to . . . (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties.



### Constitution of Uganda (1995)

Section 21(1) All persons shall have the right to . . . (e) freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interests.

### SCOPE OF FREEDOM OF ASSOCIATION

The freedom of association has two main aspects. The first aspect is that it protects the freedom of the individual to form, join or participate in the activities of an association. It is well established that this does not mean the freedom to associate with a particular association: that is to say it is not a right to become a member of a particular association.<sup>69</sup> What has been less obvious is whether or not the negative freedom not to associate is necessarily covered by the freedom itself. Among the major international human rights instruments, only the Universal Declaration of Human Rights and the African Charter on Human and People's Rights specifically protect the freedom not to associate.<sup>70</sup> In national constitutions, most countries in Southern Africa do not enshrine a negative freedom to associate.<sup>71</sup> Be that as it may, the weight of international human rights jurisprudence favours the view that the negative freedom not to associate is necessarily implied by the very notion of freedom of association and is thus covered.<sup>72</sup>

The second aspect of the freedom of association is that it protects the association itself, once formed, from undue interference by the state. The freedom entitles the association to run its own internal affairs without outside interference. This includes the association's right to determine its own management rules, to solicit membership and to make its own decisions. In the United States, the Supreme Court has held that a compulsion for the disclosure of an association's membership list in circumstances where disclosure would subject the members to various reprisals is an infringement of freedom of association of the members and the association.<sup>73</sup>

These two aspects do not, in themselves, provide answers to some pertinent questions. Does the freedom of association oblige the state to ensure that every association is recognised by law as a body corporate? It is submitted that for freedom of association to be effective, an association must enjoy legal personality and be able to act independently. This requires the state to put in place a legal framework (be it common law or statute or both) which facilitates the formation and legal recognition of associations.<sup>74</sup> This does not mean that the state has a positive obligation to ensure that every association is recognised by law as

69. See European Commission of Human Rights in *Cheall v UK* No 10550/83 42 DR 178 at 185 (1985).

70. See Article 20(2) of the UN Declaration of Human Rights and Article 10(2) of the African Charter on Human and People's Rights.

71. Of the four countries whose relevant constitutional provisions have been reproduced here, only Zimbabwe specifically protects the negative freedom.

72. See *Young, James & Webster v UK* (1982) 4 EHRR 38 (European court of Human Rights); *Aboud v Detroit Board of Education* 431 US 209 (1977); *Lavigne v OPSEU* (1991) 81 DLR (4th) 545 (Canada); *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275 (T) (South Africa).

73. See *NAACP v Alabama* 357 US 449 (1958).

74. See generally Harris, O'Boyle & Warbrick *op. cit.* p. 423.

a body corporate, but merely that it must avail a legal framework which enables individuals to form associations which are recognised by law. However, even where such a legal framework exists, the mere fact that an association has not attained legal personality does not mean that freedom of association has been infringed.

Another question is whether or not the freedom of association exists for every purpose sought to be pursued by individuals who come together. In principle, the freedom of association is available regardless of the purpose or goals sought to be pursued. It is contrary to the essence of the freedom for the state to prescribe the kind of objectives or goals for which freedom of association is available. Given that freedom of expression protects the expression of unpopular views such as racism, the formation of organisations to advance such views is protected.<sup>75</sup> However, where the state prescribes certain purposes to be illegal, this amounts to a restriction of the freedom and can only be upheld if it passes the proportionality test.<sup>76</sup> In other words, if the proportionality test is satisfied, the freedom of association cannot be available for that illegal purpose.

The next question is that of the nature of the organisation that deserves to be called an "association" for purposes of the protection offered by the freedom. This is mainly relevant where it is the "association" itself seeking to enforce freedom of association, say, by insisting on non-interference in its internal affairs. While no specific form is required, it is submitted that the grouping, even where it is informal, must have some identifiable structure which makes it possible to separate it from its members.<sup>77</sup> Further, the grouping must have been consciously formed for some common objective or goal: a *de facto* relationship, such as between prisoners or employees of a company, does not constitute an "association".<sup>78</sup>

A well established aspect of the freedom of association is the freedom to form and to join trade unions. Trade union freedom has been described as a "special aspect of the freedom of association."<sup>79</sup> The central question with trade union freedom is: what does it entail? Does it cover certain rights which are essential for the effective work of trade unions, such as the right to strike? The European Court of Human Rights has addressed this question in a number of cases and has held that freedom of association, in so far as it relates to trade unions, only covers those rights which can be regarded as indispensable for the exercise of the freedom.<sup>80</sup> The only right regarded by the court as indispensable for the effective enjoyment of freedom of association by a trade union is the right to be heard by the employer on behalf of its members.<sup>81</sup> The following rights have been rejected as neither being indispensable for the effective enjoyment of the freedom nor being necessarily inherent in

75. See the American case of *Brandenburg v Ohio* 395 US 444 (1969) which allowed the Ku Klux Klan publicly to articulate its racist and anti-semitic beliefs.

76. See generally *Lavis v France* No 14223/88 70 DR 218 at 234-239 (1991).

77. See D.J. Harris *et. al*, *op. cit* p. 421.

78. See *McFedeley v UK* No 8317/78, 20 DR44 at 98 (1980).

79. See Karen Reid *A Practitioner's Guide to the European Convention of Human Rights* (Sweet & Maxwell, 1998) p. 228.

80. See *National Union Belgian Police v Belgium* 1 EHRR 518 (1975); *Swedish Engine Drivers Union v Sweden* EHRi. 617 (1976).

81. *Ibid.*

the notion of freedom of association for trade unions: right to be consulted by the employer, right to engage in collective bargaining and right to strike.<sup>82</sup>

The approach of the European Court of Human Rights is supported elsewhere and thus the weight of international human rights jurisprudence appears to be that trade unions cannot rely on mere freedom of association to extract fundamental rights like right to strike and right to engage in collective bargaining.<sup>83</sup> To enjoy the latter rights, more specific provisions beyond mere freedom of association are required.

However, given the special nature of trade union freedom, the issues of the negative freedom not to associate is complex in labour relations. It raises two questions. First, does the state have a positive duty to control private persons from infringing other individuals' freedom of association? Secondly, are there situations in which denial of the freedom not to associate may not be regarded as an infringement of the freedom of association? Both questions mainly arise with "closed shop" arrangements in labour relations. A closed shop is an arrangement between an employer and a trade union whereby all employees within a particular workplace are required, as a condition of their employment, to be members of a given trade union. Regarding the first question, there is no doubt that the state has a positive obligation to ensure that private persons do not infringe the right to freedom of association.<sup>84</sup> This infringement may come either in the form of a closed shop or where exclusion or expulsion from membership of a trade union is not in accordance with rules or is based on arbitrary provisions.

The second question has arisen in cases where it has been argued that a closed shop, given the peculiarities of labour relations, may not be an infringement of the freedom of association. The position from case law appears to be this: the issue in each case is to determine the extent to which the compulsory membership strikes at the very substance of freedom of association. In other words, compulsion to join a trade union may or may not lead to infringement of the freedom of association. It will be regarded as an infringement where it strikes at the very substance of the freedom as was the case in *Young, James and Webster v UK*.<sup>85</sup> In that case, the closed shop was applied to workers who were already in employment and had been employed before the arrangement came into force. Further, the employees were strongly opposed to trade union membership. The consequence of refusal to join was dismissal and there was no provision that the employees in question could form their own union.

It will be regarded as not an infringement where it does not strike at the very substance of freedom of association, such as was the case in *Sibson v United Kingdom*<sup>86</sup> where the

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82. *Ibid.* For the right to strike, see *Schmidt and Dahlstrom v Sweden* 1 EHRR 632 (1976) where the court sounded sympathetic to the view of the right to strike as indispensable.

83. See the discussion and cases referred thereto in L. Madhuku, "The Right to Strike in Zimbabwe", 1995 *Zimbabwe Law Review* 113 at 116-118 and L. Madhuku, "The Right to Strike in Southern Africa", 1997 *International Labour Review* 509 at 512.

84. See *Young, James and Webster v UK* (supra); *Sibson v UK*.

85. *Ibid.* See also *Sigurjonsson v Iceland* 16 EHRR 462 (1993) where compulsory membership of a taxi association was nullified.

86. 17 EHRR 193 (1993).

employee, on refusal to join, was moved to another workplace on almost similar terms and conditions of employment and his contract of employment permitted transfers. On this approach, it is arguable that where non-members are forced to make contributions to a trade union whose bargaining services they have benefited from, there is no infringement of freedom of association because being forced to pay for a benefit cannot be said to strike at the very substance of the freedom. In any event, it cannot be said that one is being forced to belong to a trade union merely by contributing to collective bargaining processes as this does not involve any association with a political or ideological position. Collective bargaining is now deeply rooted in the employment relationship.<sup>87</sup>

It is submitted that this approach of seeking to find no infringement on the basis of "not striking at the very substance of the freedom" is misguided. An infringement is an infringement, whatever its extent. The better approach is to regard every infringement as an infringement and then seek to uphold some infringements which satisfy the proportionality test. Thus, a closed shop is an infringement of freedom of association but may, in given circumstances, be justifiable in the public interest and may be upheld if it satisfies the proportionality test.

## RESTRICTIONS ON FREEDOM OF ASSOCIATION

Restrictions on freedom of association are dealt with in exactly the same way as restrictions on freedom of assembly. A restriction must be "prescribed by law" and be "justifiable in a democratic society". Ultimately, it is the proportionality test which determines whether or not a restriction is permissible. There are two main peculiar restrictions with freedom of association.

The first is the banning of an association, which in a lesser form takes the route of the state preventing the formation of an association. The proportionality test will make it difficult for such forms of restrictions to survive scrutiny. However, where an association exists to engage in serious criminal activities or where a political association seeks to subvert the democratic order, the proportionality test may lean in favour of an outright ban or prevention of the formation of the association.

To be acceptable, the legislation facilitating the ban must not create room for arbitrariness. In Zimbabwe, the Unlawful Organisations Act<sup>88</sup> provides a legal framework for the banning and dissolution of organisations "in the interests of defence, public safety or public order".<sup>89</sup> Section 3(1) of the Act provides as follows:

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87. See the American case of *Abood v Detroit Board of Education* 431 US 209 (1977) where the court held that compulsory union dues for collective bargaining purposes did not infringe freedom of association. See also the Canadian case of *Lavigne v OPSEU* 1986 (33) DLR (4th) 174 where the court rejected a claim by a union member that mandatory union dues collected by his collective bargaining unit compelled him to associate with the political causes pursued by the trade union thereby infringing his freedom of association. One judge was of the view that mere contribution of union dues do not lead to an association with the views ultimately pursued by the trade union.

88. Chapter 11:13.

89. See the long title of the Act.

The President may, by proclamation, declare any organisation to be an unlawful organisation if it appears to the President that the activities of that organisation or of any of the members of that organisation are likely to endanger, disturb or interfere with defence, public safety or public order in Zimbabwe.

This provision leaves room for arbitrariness in that the decision to ban is at the discretion of the president and the permissible grounds for a ban are too broad to provide meaningful criteria. This may not satisfy the "prescribed by law" requirement, let alone the proportionality test.

In trade union matters, some countries exclude certain categories of workers from the freedom to form or join trade unions of their choice. This exclusion is normally applied to the army and the police. Article 11(2) of the European Convention allows "lawful restrictions" on the exercise of the freedom by "members of the armed forces or the police or the administration of the state".

The inclusion of members of "the administration of the state" among groups whose freedom of association may be restricted makes this Convention oppressive. Indeed in the famous case of *Council of Civil Service Unions v UK* (the GCHQ case),<sup>90</sup> the Commission of Human Rights upheld a law that denied trade union freedom to public service employees working at a UK communications interception station. The law in question only allowed the employees the right to be members of an approved staff association, which had much less impact than a trade union. The International Labour Organisation (ILO) does not accept such wide restrictions on trade union freedom. In its Convention on Freedom of Association, it allows restrictions to be imposed on the armed forces and the police but not employees involved in "the administration of the state".<sup>91</sup> This means that apart from the police and members of the armed forces, all employees must be allowed to form or join trade unions of their choice.

It is difficult to justify exclusion of public service employees from the enjoyment of freedom of association and the better view must be that any restrictions seeking to exclude such employees from trade unions cannot pass the proportionality test.

Recent developments in human rights jurisprudence signal a trend where even the exclusion of the armed forces and the police from trade union membership may be regarded as not reasonably justifiable in a democratic society. In the recent case of *South African National Defence Union v Minister of Defence*,<sup>92</sup> the South African Constitutional Court declared unconstitutional a law that outlawed trade unions in the Defence Force as being contrary to Section 23 of the South African Constitution. Section 23 of the South African Constitution grants every worker the right to "form and join a trade union" and the question before the court was whether or not the prohibition applied in respect of members of the armed forces was justifiable in a democratic society. The court said it was not justifiable as mere

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90. No 11603/85, 50DR 228 (1987).

91. See ILO Convention 87 of 1948, Article 9(1) which provides as follows: "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national law or regulations".

92. 1999 (4) SA 469 (CC).

membership of a trade union cannot, in itself, lead to indiscipline. An instructive passage from O'Regan J's judgement reads as follows:

This case is concerned primarily with the right to form and join trade unions. Section 126B(1) constitutes a blanket ban on such a right. There can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force. I am not persuaded, however, that permitting members of the Permanent Force to join a trade union, no matter how its activities are circumscribed, will undermine the discipline and efficiency of the Defence Force. Indeed, it may well be that in permitting members to join trade unions and in establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished.<sup>93</sup>

The second form of restrictions relates to the issue of interference with the internal affairs of the association. As already noted, an important aspect of freedom of association is associational autonomy, namely that an association is entitled to pursue its activities without outside interference. This entails that, in general, the association must be free to run its admission and expulsion rules and provide for its own internal decision-making processes. However, it is common for the state to interfere with certain internal issues, with the main justifications being the need to ensure a commitment to internal democracy, the prohibition of unfair discrimination and the protection of the minority from abuse by the majority.

Such interferences may pass the proportionality test and may therefore be legitimate. For instance, rules requiring trade unions to adopt constitutions with certain mandatory provisions as a way of promoting internal democracy and accountability are legitimate. In some countries, there are rules which regulate the internal processes of political parties and these tend to be controversial, but there is merit in regarding such rules as legitimate where they require political parties to follow democratic processes in the election of leaders and candidates for public office.<sup>94</sup>

An example of an excessive interference in the internal affairs of an organisation is provided by the Zimbabwean Private Voluntary Organisations Act.<sup>95</sup> Section 21 of that Act, *inter alia* empowers the responsible Minister to "suspend all or any of the members of the executive committee of a registered organisation if he/she receives information showing that it is "necessary or desirable to do so in the public interest." This section was challenged as being an infringement of freedom of association in *Holland Ors v Minister of the Public Service, Labour and Social Welfare*<sup>96</sup> when the Minister suspended the executive committee of a private organisation called the Association of Women's Clubs (AWC). The Supreme Court decided the matter on a different point relating to infringement of the right to a fair hearing and left open the question of breach of freedom of association. It is submitted that the section is in breach of freedom of association in that it gives the Minister arbitrary powers over an aspect which is central to the autonomy of associations. That aspect is an association's right to determine its own leadership.

93. para 35.

94. See *Smith v Allwright* 321 US 649 (1944); *Terry v Adams* 345 US 461 (1953).

95. Chapter 17:05.

96. 1997 (1) ZLR 186 (S).

A restriction under this head may also take the form of a requirement that an association be registered before it can operate. Such a restriction may only pass the proportionality test if there are clear dangers in allowing unregistered organisations to operate and the registration regime is not too restrictive.

## CONCLUSION

The freedoms of assembly and of association lie at the heart of a democratic dispensation. It is for this reason that they find protection in almost every modern democracy. This discussion of some international and comparative perspectives sought to explore the scope of these freedoms and the extent to which they may be limited or restricted. It has been demonstrated that these freedoms have a broad spectrum which can still be developed for their effective enjoyment by individuals. On the other hand, the restrictions on the freedoms can be narrowed if a proper perspective is nurtured.



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